**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS**

**NUMBER 02-0263**

**INTERNATIONAL FUEL TAX AGREEMENT AND INDIANA MOTOR CARRIER FUEL TAX**

**FOR THE PERIOD 1993–95**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the *Indiana Register* and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the *Indiana Register*. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

## ISSUES

### I. International Fuel Tax Agreement ("IFTA")-- Credits Against Tax—Disallowed Excess Tax-Paid Fuel Credit—Type of Records Required

### Tax Administration (Motor Carrier Fuel Tax)—Differences Between IFTA and Motor Carrier Fuel Tax Law—Type of Records Required for Tax-Paid Fuel Credit

Authority: 49 U.S.C. § 31705 (1994 and 2000); IC § 6-6-4.1-6(a)(3) (1993); *State v. Sproles,* 672 N.E.2d 1353 (Ind. 1996); *Dowd v. Grazier,* 116 N.E.2d 108 (Ind. 1953); *State ex rel. Standard Oil Co. v. Review Bd. of Employment Sec. Div.,* 101 N.E.2d 60 (Ind. 1951); *Miami Coal Co. v. Fox,* 176 N.E. 11 (Ind. 1931); *Owner-Operator Indep. Drivers Ass'n v. State Dep't of Revenue,* 725 N.E.2d 891 (Ind. Ct. App.), *reh'g denied, trans. denied mem. sub nom. Indiana Drivers Ass'n v. State,* 741 N.E.2d 1251 (Ind. 2000); *Felix v. Indiana Dep't of State Revenue,* 502 N.E.2d 119 (Ind. Ct. App. 1986); *Indiana Dep't of State Revenue v. Convenient Indus. of Am., Inc.,* 299 N.E.2d 641 (Ind. Ct. App. 1973); *Hi-Way Dispatch, Inc. v. Indiana Dep't of State Revenue,* 756 N.E.2d 587 (Ind. Tax Ct. 2001); *Bethlehem Steel Corp. v. Indiana Dep't of State Revenue,* 597 N.E.2d 1327 (Ind. Tax Ct. 1992), *aff'd* 639 N.E.2d 264 (Ind. 1994)

The taxpayer argues that IC § 6-6-4.1-6(a)(3) (1993), which requires proof of payment of a pump or road tax in order to claim a credit from Indiana motor carrier fuel tax, conflicts with IFTA, which does not impose such a requirement.

**II. Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (Federal)—Interstate Commerce Clause**

**Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (Federal)—Equal Protection Clause**

**Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (State)—Equal Privileges and Immunities Clause**

Authority: U. S. CONST. art. I, § 8, cl. 3 and amend. XIV, § 1; IND. CONST. art. I, § 23 and art. III, § 1; 49 U.S.C. § 31705 (1994 and 2000); *Merrion v. Jicarilla Apache Tribe,* 102 S.Ct. 894 (U.S. 1982); *State v. Sproles,* 672 N.E.2d 1353 (Ind. 1996); *Dowd v. Grazier,* 116 N.E.2d 108 (Ind. 1953); *State ex rel. Standard Oil Co. v. Review Bd. of Employment Sec. Div.,* 101 N.E.2d 60 (Ind. 1951); *Miami Coal Co. v. Fox,* 176 N.E. 11 (Ind. 1931); *Owner-Operator Indep. Drivers Ass'n v. State Dep't of Revenue*, 725 N.E.2d 891 (Ind. Ct. App.), *reh'g denied, trans. denied mem. sub nom. Indiana Drivers Ass'n v. State*, 741 N.E.2d 1251 (Ind. 2000); *L.E. Services, Inc. v. State Lottery Comm'n*, 646 N.E.2d 334 (Ind. Ct. App. 1995); *Felix v. Indiana Dep't of State Revenue,* 502 N.E.2d 119 (Ind. Ct. App. 1986); *Indiana Dep't of State Revenue v. Convenient Indus. of Am., Inc.*, 299 N.E.2d 641 (Ind. Ct. App. 1973); *Hi-Way Dispatch, Inc. v. Indiana Dep't of State Revenue,* 756 N.E.2d 587 (Ind. Tax Ct. 2001); *Bethlehem Steel Corp. v. Indiana Dep't of State Revenue*, 597 N.E.2d 1327 (Ind. Tax Ct. 1992), *aff'd* 639 N.E.2d 264 (Ind. 1994)

In the alternative, the taxpayer contends IC § 6-6-4.1-6(a)(3) violates the dormant Interstate Commerce and Fourteenth Amendment Equal Protection Clauses of the federal constitution and the Equal Privileges and Immunities Clause of the Indiana Constitution.

**III. IFTA/Tax Administration—Negligence Penalty**

Authority: IFTA arts. IX, § F and XVII, § G (1993); IFTA Procedures Manual art. VI, § A.3 (1993)

Lastly, the taxpayer submits that the Department should waive the negligence penalty assessed against it.

## STATEMENT OF FACTS

Throughout calendar years 1993-95 ("the audit period") the taxpayer, an Indiana-chartered corporation, was engaged in the business of a common motor carrier. It held a license from this Department under the International Fuel Tax Agreement (February 1993) (superseded January 1996 effective July 1, 1998, rev. Jan. 2002) (hereinafter "IFTA"). During the audit period the taxpayer (hereinafter also referred to as "the licensee") operated, among other motor vehicles, a fleet of from between twelve to eighteen diesel-fueled semi-tractors based in Indiana. All of the

semi-tractors were "qualified motor vehicles" as IFTA article I, § K (current version at *id*. article I, § R245 (1998)) defined that term, making their fuel consumption subject to IFTA. During the audit period the taxpayer did not maintain any bulk fuel facilities at its principal place of business to fuel these vehicles. It did so exclusively by having its drivers purchase the fuel over the road.

The Department audited the licensee under IFTA for the audit period. The field auditor disallowed the taxpayer Indiana tax-paid fuel credit for any over-the-road fuel purchased in Indiana but consumed in one or more non-IFTA member jurisdictions and for which it did not also pay a pump or road tax to such jurisdiction/s. Lastly, the Department proposed a ten percent negligence penalty. The licensee timely protested the latter two adjustments. The Department will provide additional facts as needed.

## I. International Fuel Tax Agreement ("IFTA")-- Credits Against Tax—Disallowed Excess Tax-Paid Fuel Credit—Type of Records Required

## Tax Administration (Motor Carrier Fuel Tax)—Differences Between IFTA and Motor Carrier Fuel Tax Law—Type of Records Required for Tax-Paid Fuel Credit

## DISCUSSION

### A. EXHAUSTION OF REMEDIES AND SCOPE OF DEPARTMENT'S REVIEW WHEN A TAXPAYER RAISES CONSTITUTIONAL ISSUES

The licensee has challenged the constitutionality of IC § 6-6-4.1-6(a)(3), under which the auditor disallowed tax-paid fuel credit, on three federal and state grounds. The allegedly violated constitutional provisions are the dormant Interstate Commerce Clause (U.S. CONST. art. I, § 8, cl. 3), the Equal Protection Clause of the Fourteenth Amendment (*id.* amend. XIV, § 1) and the Equal Privileges and Immunities Clause (IND. CONST. art. I, § 23). The taxpayer's challenges under the latter two clauses are essentially one argument, since both the United States Supreme Court and the Indiana courts have held that the rights the two clauses were intended to protect are identical. *See, e.g., State Bd. of Tax Comm'rs v. Jackson,* 51 S.Ct. 540, 545 (U.S. 1931); *Miles v. Department of Treasury,* 199 N.E. 372, 379 (Ind. 1935), citing *inter alia*, *Jackson;* and *Area Interstate Trucking, Inc. v. Indiana Dep't of State Revenue,* 605 N.E.2d 272, 275 (Ind. Tax 1992). The licensee argues that IC § 6-6-4.1-6(a)(3) is unconstitutional on its face under each of these provisions.

The Indiana Supreme Court has held that constitutional analysis is beyond the Department's expertise. *State v. Sproles,* 672 N.E.2d 1353, 1360 (Ind. 1996). Taxpayer claims that a tax statute is unconstitutional on its face in particular are beyond the Department's administrative authority and adjudicative jurisdiction on the additional ground of the Indiana state constitutional doctrine of separation of powers. IND. CONST. art. III, § 1; *Dowd v. Grazier,* 116 N.E.2d 108, 112 (Ind. 1953); *State ex rel. Standard Oil Co. v. Review Bd. of Employment Sec. Div.,* 101 N.E.2d 60, 66 (Ind. 1951).

"The temptation to consider the Indiana [listed taxes] here upon [constitutional] terms, as has been done almost invariably in the past, is like the lure of the siren's song." *Indiana Dep't of State Revenue v. Convenient Indus. of Am., Inc.*, 299 N.E.2d 641, 643 (Ind. Ct. App. 1973), *quoted in Bethlehem Steel Corp. v. Indiana Dep't of State Revenue*, 597 N.E.2d 1327, 1330 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"), *aff'd* 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"). However, it is well settled that a taxpayer challenging on constitutional grounds a tax statute that the Department administers or a tax that it has levied nevertheless must make that challenge by exhausting, and may not bypass, its statutory administrative remedies before raising it in the Indiana Tax Court. *Sproles*, 672 N.E.2d at 1361, citing, among other opinions, *Felix v. Indiana Dep't of State Revenue*, 502 N.E.2d 119 (Ind. Ct. App. 1986); *Owner-Operator Indep. Drivers Ass'n v. State Dep't of Revenue*, 725 N.E.2d 891, 893-94 (Ind. Ct. App.) (citing *Sproles*), *reh'g denied, trans. denied mem. sub nom. Indiana Drivers Ass'n v. State*, 741 N.E.2d 1251 (Ind. 2000). As a matter of procedure the present licensee therefore was correct to raise its constitutional issues with the Department initially. The Court of Appeals in *Felix* stated the reasons for the exhaustion requirement as follows:

> [T]he "absolute and indispensible [sic] prerequisite" of [exhausting administrative remedies] "serves to advise the appropriate internal revenue officials of the claims intended to be asserted by the taxpayer, so as to insure an orderly administration of the revenue." *McConnell v. United States* (E.D. Tenn. 1969), 295 F. Supp. 605, 606. Finally, *the requirement of [exhausting administrative remedies] even for a constitutional challenge will afford the Department the opportunity to resolve the matter on nonconstitutional grounds. See Christian v. New York State Department of Labor* (1974), 414 U.S. 614, 622-24, 94 S.Ct. 747, 751-52, 39 L.Ed.2d 38, 45-47. *For example, the Department may determine in an audit that [a taxpayer's] claimed refund is inappropriate for other reasons or that is [sic] allowable under other tax provisions. Weinberger v. Salfi* (1975), 422 U.S. 749, 762, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522, 537.

502 N.E.2d at 122 (emphases added), approved in *Sproles*, 672 N.E.2d at 1361. The Department interprets the emphasized language as requiring it, whenever possible, to decide any tax protest in which, or any issue in a protest in connection with which, the taxpayer in question has raised constitutional issues on any non-constitutional grounds that taxpayer may also have raised. *Cf. Miami Coal Co. v. Fox*, 176 N.E. 11, 17 (Ind. 1931); *see also Bethlehem Steel I*, 597 N.E.2d at 1339, *aff'd in Bethlehem Steel II*, 639 N.E.2d at 272 (all finding it unnecessary to resolve a constitutional challenge after deciding the case on non-constitutional grounds). However, if the Department cannot successfully resolve a protest on such non-constitutional grounds, or if a taxpayer has not raised any non-constitutional issues, it will only address claims of unconstitutionality to the extent necessary to resolve a protest and only as applied to the taxpayer and assessment in question. In addition, the Department will do so only to the extent authorized, or at least not precluded, by statute.

Of the licensee's substantive challenges to IC § 6-6-4.1-6(a)(3), the Department will therefore first consider its argument under IFTA, to which it now turns.

## B. THE LICENSEE'S IFTA ARGUMENT

IC § 6-6-4.1-6(a)(3) requires proof of payment of a pump or road tax to one or more other jurisdictions in order to claim a credit from Indiana motor carrier fuel tax for fuel purchased in, but consumed outside, Indiana. The taxpayer argues that this statutory requirement violates several provisions of IFTA and the IFTA Procedures Manual (1993). Specifically, the taxpayer contends that IC § 6-6-4.1-6(a)(3) conflicts with IFTA article VII, § B and IFTA Procedures Manual article II. The former provision states that "[n]o member jurisdiction shall require evidence of such purchases beyond what is specified in the IFTA Procedures Manual[,]" *id.*, and the latter contains no provision comparable to that of IC § 6-6-4.1-6(a)(3). The licensee submits that the latter statute also violates IFTA article XIII, § A, which entitles licensees to receive full credit or refund for tax paid on fuel used outside the jurisdiction of purchase, and IFTA Procedures Manual article V, § A.7, which mandates that member jurisdictions to give full credit for such tax-paid purchases. Lastly, the taxpayer argues that IC § 6-6-4.1-6(a)(3) violates IFTA article I, § B, which states that one of the purposes of IFTA is to "promote and encourage the fullest and most efficient possible use of the highway system by making uniform the administration of motor fuels use taxation laws with respect to motor vehicles operated in multiple member jurisdictions." *Id.*

## C. IC § 6-6-4.1-6(a)(3), NOT IFTA, GOVERNED ENTITLEMENT TO CREDIT FOR TAX-PAID FUEL CONSUMED IN JURISDICTIONS THAT WERE NOT IFTA MEMBERS.

The law firm representing the present licensee was also counsel of record on appeal in *Hi-Way Dispatch, Inc. v. Indiana Dep't of State Revenue*, 756 N.E.2d 587 (Ind. Tax Ct. 2001), decided while this protest was pending, and in which counsel made much the same arguments. *See id.* at 601-02 (summarizing those arguments). In response, the Indiana Tax Court held in part that IC § 6-6-4.1-6(a)(3), not IFTA, governed a motor carrier taxpayer's entitlement to claim credit for tax-paid fuel consumed in jurisdictions that were not IFTA members. 756 N.E.2d at 602.

The auditor of the present taxpayer, like the auditor of the licensee in *Hi-Way Dispatch*, disallowed tax-paid credit for fuel consumed in jurisdictions that were not IFTA members during the audit period. The holding of *Hi-Way Dispatch* on this subject therefore controls, and the present auditor thus did not err in disallowing the licensee tax-paid credit for such fuel. The Department notes, however, that this particular issue will not recur in audits covering reporting periods beginning after September 30, 1996. With two exceptions not relevant here, Congress has mandated that all states and the District of Columbia conform to IFTA as a condition of their continued ability to require the reporting and payment of fuel taxes after that date. Subsection 4008(g), Motor Carrier Act of 1991 (Title IV of the Intermodal Surface Transportation Efficiency Act of 1991), Pub. L. 102-240, 105 Stat. 1914, 2140 and 2154 (recodified at 49 U.S.C. § 31705 (1994 and 2000).

## FINDING

The taxpayer's protest is denied as to this issue.

## II. Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (Federal)—Interstate Commerce Clause

## Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (Federal)—Equal Protection Clause

## Motor Carrier Fuel Tax—Credits Against Tax—Constitutionality (State)—Equal Privileges and Immunities Clause

## DISCUSSION

### A. THE DEPARTMENT CANNOT CONSIDER THE LICENSEE'S FACIAL CONSTITUTIONAL CHALLENGES TO IC § 6-6-4.1-6(a)(3).

As noted in the Discussion of Issue I above, the present taxpayer contends that IC § 6-6-4.1-6(a)(3) is unconstitutional on its face, rather than as applied to it. The controlling Indiana judicial precedents discussed there thus bar the Department from considering these arguments. *See Sproles,* 672 N.E.2d at 1360; *Grazier,* 116 N.E.2d at 112; and *Standard Oil,* 101 N.E.2d at 66.

### B. THE INDIANA TAX COURT HAS ALREADY HELD THAT IC § 6-6-4.1-6(a)(3) DOES NOT VIOLATE THE DORMANT INTERSTATE COMMERCE CLAUSE.

Even if the Department were not precluded from considering the licensee's facial constitutional challenges to IC § 6-6-4.1-6(a)(3), the taxpayer would lose on the merits of its dormant Interstate Commerce Clause attack. The Indiana Tax Court in *Hi-Way Dispatch* ruled in the Department's favor on this issue as well. 756 N.E.2d at 602-05. Moreover, dormant Interstate Commerce Clause arguments will not be available to challenge any provision of IFTA, and this Department will not be able to consider such arguments, in protests of IFTA audits covering reporting periods beginning after September 30, 1996. Congress' mandating state membership in IFTA in subsection 4008(g) of the Motor Carrier Act of 1991, 49 U.S.C. § 31705, was an exercise of its power under, and its existence bars judicial review of any assessment under the dormant, Interstate Commerce Clause. *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 910-11 (U.S. 1982), *quoted in L.E. Services, Inc. v. State Lottery Comm'n,* 646 N.E.2d 334, 346 (Ind. Ct. App. 1995).

## FINDING

The taxpayer's protest is denied as to this issue.

**III. IFTA/Tax Administration—Negligence Penalty**

## DISCUSSION

Most of the proposed assessment forming the subject of this protest is attributable to underreported miles the licensee's subject commercial motor vehicles traveled in IFTA member jurisdictions. The auditor calculated the total miles all of the licensee's subject commercial motor vehicles had traveled in all IFTA and non-IFTA jurisdictions in the sampled quarters from the units' respective odometer readings. She then subtracted from this figure the total miles the taxpayer had reported on its IFTA-101 returns. The auditor called the difference between the two figures "gap" miles, based on her discovery that there were substantial gaps in the taxpayer's recorded odometer readings for the subject vehicles. She inferred that the reason for these gaps was that the licensee's drivers had failed to report miles traveled within a city or town (called "in-and-around" miles) on the individual trip mileage records its drivers had prepared. The taxpayer had totaled the miles recorded on these reports in quarterly mileage summaries that it in turn used to prepare its quarterly IFTA-101 returns. The taxpayer thus failed to report the "gap" or "in-and-around" miles because its drivers had failed to include them on their respective mileage records. The auditor prorated these miles to each member jurisdiction (except for Arizona and Wyoming, where the taxpayer had used trip permits) based on the miles the licensee had recorded in its quarterly summaries.

The licensee submits that the Department should waive the proposed negligence penalty. The taxpayer argues that under IFTA article IX, § F there is "reasonable cause," *id.*, to do so in that it relied on the mileage records that IFTA requires and that its drivers prepared. However, the licensee has not cited to any legal authority for the proposition that a taxpayer's employee's failure to record less than all of the information necessary to comply with the tax laws is "reasonable cause" to abate a penalty a taxing authority has assessed against that taxpayer.

Before ruling on the taxpayer's argument, the Department believes it appropriate to discuss the parts of IFTA, the IFTA Procedures Manual (1993), the IFTA Audit Procedures Manual (1993) and the Indiana Code (1993) in effect during the audit period that specified an IFTA licensee's procedural obligations in an administrative appeal of an audit finding. As it read during the audit period, IC § 6-8.1-3-14(b) stated in relevant part that "if the provisions set forth in [the Base State Fuel Tax A]greement or other agreements [*e.g.*, IFTA] are different from provisions prescribed by an Indiana statute, then the agreement provisions prevail." *Id.* IFTA article XVII, § G states that "[a]dopted procedures shall become a part of this Agreement and shall be placed in writing in the IFTA Procedures Manual." *Id.* IFTA Procedures Manual article VI, § A.3 states in relevant part that "[t]he assessment made by a base jurisdiction … shall be presumed to be correct, and in any case where the validity of the assessment is drawn in question, the burden [of proof] shall be on the licensee to establish by a fair preponderance of evidence that the assessment is erroneous or excessive." *Id.*

BLACK'S LAW DICTIONARY (7th ed. 1999) defines the term "burden of proof" as a "party's duty to prove a disputed assertion or charge." *Id.* at 190. The burden of proof is two-fold, consisting of both the burden of persuasion and the burden of production. *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985) (noting that "burden of proof" is not a precise term, as it

can mean both the burdens of persuasion and production). The terms "burden of production" and "burden of persuasion" have two distinct meanings. *See State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994) (stating that there are "two senses" of the term "burden of proof," the burdens of persuasion and production). The burden of production, also referred to as the burden of going forward, is the party's (in tax protests the taxpayer's) "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder." *Id*. In other words, a taxpayer must submit evidence sufficient to establish a prima facie case, i.e., evidence sufficient to establish a given fact and which if not contradicted will remain sufficient to establish that fact. *See Longmire v. Indiana Dep't of State Revenue*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Canal Square Ltd. Partnership v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998). *Cf. Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990) (observing, in challenge to state's sales and use tax audit, that comptroller's deficiency determination is prima facie correct and that taxpayer must disprove it with documentation).

In contrast to the burden of production component of the burden of proof, the burden of persuasion is the taxpayer's "duty to convince the fact-finder to view the facts in a way that favors that party. … —Also loosely termed *burden of proof*." BLACK'S LAW DICTIONARY 190 (7th ed. 1999) (emphasis in original.). Some cases have referenced this dual meaning. *See, e.g., Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991) (observing that in criminal cases, the "State carries the ultimate burden of proof, or burden of persuasion").

As previously noted, the taxpayer failed even to cite to, much less discuss, any authorities supporting the idea that its employees' misfeasance in record keeping is reasonable cause to abate the negligence penalty the Department assessed against it. It has therefore failed to sustain its burdens of persuasion, and of proof, on this point. IFTA article XVII, § G; IFTA Procedures Manual article VI, § A.3.

## FINDING

The licensee's protest is denied as to this issue.

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